

NO. 94-596

IN THE SUPREME COURT OF THE STATE OF MONTANA

1995

~~FILED~~

ARTHUR W. SCHMIDT,  
Plaintiff and Appellant,

v.

BUTTE-SILVER BOW, a government entity,  
Defendant and Respondent.

JUL 17 1995

*Ed. Smith*  
CLERK OF SUPREME COURT  
STATE OF MONTANA

APPEAL FROM: District Court of the Second Judicial District,  
In and for the County of Silver Bow,  
The Honorable James E. Purcell, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

J. Brian Tierney, Attorney at Law, Butte, Montana

For Respondent:

William M. O'Leary, Corette, Pohlman, Allen,  
Black & Carlson, Butte, Montana

Submitted on Briefs: June 8, 1995

Decided: July 17, 1995

Filed:



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Clerk

Chief Justice J. A. Turnage delivered the Opinion of the Court.

The District Court for the Second Judicial District, Silver Bow County, granted summary judgment for Butte-Silver Bow in this tort action. Arthur W. Schmidt appeals. We affirm.

The issues are whether the District Judge erred by not recusing himself, by granting Butte-Silver Bow's motion for summary judgment, and by denying Schmidt's motion to amend his complaint.

Schmidt owns real property in Butte, Montana, which is bordered on one side by a dedicated alley. The alley separates Schmidt's property from property owned by Leipheimer Ford Sales Company (Leipheimer). Schmidt rents his property for use as a horse pasture and has access to the property other than via the alley.

In 1966, the City Council of the City of Butte directed Leipheimer to make the alley suitable for public travel. In 1976 Schmidt asked the City of Butte to perform repairs and maintenance on the alley. The City rejected Schmidt's request.

In April 1978, Schmidt filed a complaint against Leipheimer, alleging that its construction of a building on its property had resulted in a change of grade of the alley which caused drain waters and other material to flow onto his property. That action was settled in 1979 and dismissed with prejudice.

Schmidt filed the present action in 1992. He alleges nuisance and negligence on the part of Butte-Silver Bow for failing to maintain the alley. In September 1994, Schmidt filed a motion to amend, asking leave to set forth an additional cause of action for

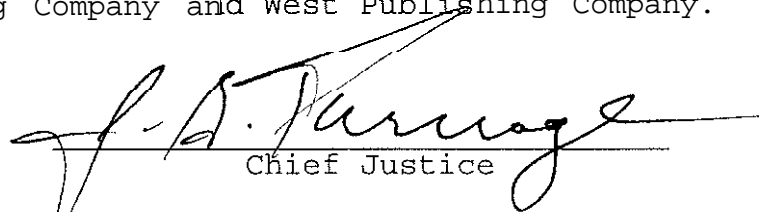
breach of the implied covenant of good faith and fair dealing.

In November 1994, the District Court granted Butte-Silver Bow's motion for summary judgment. The court ruled that the applicable statute of limitations was three years and that the statute began to run no later than 1979. It ruled that Schmidt's own admissions established that he knew the facts constituting his cause of action in 1979.

Schmidt's arguments on appeal are not persuasive. He has not set forth facts which would require the District Judge to recuse himself absent a motion to disqualify. Although Schmidt now claims that this action is based on a new building constructed on Leipheimer's property in 1989, he has admitted by deposition that there had been no change in the alley since 1979, when it was graded so that the water ran off onto his land. His claims are thus time-barred under § 27-2-204, MCA. The proposed claim of breach of the covenant of good faith and fair dealing is also time-barred, under the same statute.

We hold that the District Court did not err on any of the grounds alleged in this appeal.

Pursuant to Section I, Paragraph 3(c), Montana Supreme Court 1988 Internal Operating Rules, this decision shall not be cited as precedent and shall be published by its filing as a public document with the Clerk of the Supreme Court and by a report of its result to State Reporter Publishing Company and West Publishing Company.

  
Chief Justice

We concur:

Karla M. Gray

William Edmunds

Tracy Trewick

William Pugh  
Justices

July 17, 1995

CERTIFICATE OF SERVICE

I hereby certify that the **following** certified order was sent by United States mail, prepaid, to the following named:

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ED SMITH  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

BY: *A. Gallagher*  
Deputy